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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
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DRAFT REPORT OF THE PREPARATORY COMMITTEE

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III. FURTHER CONSIDERATION OF THE MAJOR SUBSTANTIVE AND ADMINISTRATIVE ISSUES ARISING OUT OF THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT PREPARED BY THE INTERNATIONAL LAW COMMISSION, AND, TAKING INTO ACCOUNT THE DIFFERENT VIEWS EXPRESSED DURING THE MEETINGS, DRAFTING OF TEXTS, WITH A VIEW TO PREPARING A WIDELY ACCEPTABLE CONSOLIDATED TEXT OF A CONVENTION FOR AN INTERNATIONAL CRIMINAL COURT AS A NEXT STEP TOWARDS CONSIDERATION BY A CONFERENCE OF PLENIPOTENTIARIES

E. Procedural questions, fair trial and rights of the accused

The Preparatory Committee considered this topic at its session in August 1996.

To facilitate and guide the discussion, the Chairman put forward a list of questions formulated in the context of certain specific articles of the draft statute prepared by the International Law Commission.

There was general agreement on the importance of this topic and the need to elaborate further the relevant provisions. Different views were expressed as to how best to meet this need. One view was that all the necessary principles and rules should be formulated in an integral manner, contained in the statute or annexes thereto, and adopted by the States parties. Another view was that the Statute itself should contain only the general principles, leaving the implementation and subsidiary rules to be embodied in a second or third instrument; while these instruments could all be adopted initially by the States

parties, the second and third instruments could be amended as needed by a simpler procedure (e.g. by the Court itself) without resorting to treating amendment provisions. Still, another view was to assemble at this stage those principles and rules deemed relevant and to leave the question of their placements for a later stage. The view was also expressed that it would not be practical to prepare all necessary rules down to every detail and that the Court must be given the flexibility to add detailed rules, provided that they would be consistent with the principles and rules laid down by the States parties.

A view was expressed that the procedural rules should maintain a balance between different penal systems of States and draw from their positive elements. Reference in that context was made to the penal law approach adopted by civil law States in matters dealing with hearings and investigation. These steps are taken to try to equalize the prosecutor and defence in terms of the means available to them. The judge, too, plays a more active role in conducting hearings. In that context, it was stressed that an international criminal jurisdiction should draw from the practice of any system that could assist it in the performance of its function. It should not be used as a standard to test the credibility of penal systems of individual States.

PART 4. INVESTIGATION AND PROSECUTION

Article 25. Complaint

It was noted that the complaint should contain information sufficient to indicate that investigation by the Court was warranted; it should meet a certain threshold in indicating that a crime had been committed that was within the jurisdiction of the Court and as to which the Court's exercise of jurisdiction was appropriate. The complaint should, further, address the issue of consent by a certain number of States, admissibility or complementarity. This would assist the Court in determining whether it should take action in a particular case. It was, further, stressed that the purpose of the complaint should be to describe criminal acts which appeared to warrant investigation by the Court.

In this context, it was noted that, as a minimum, a complaint should contain information on: (a) the jurisdiction relied upon in making the complaint; (b) the circumstances of the alleged crime (e.g. specific criminal conduct occurring in a specific place and during a specific time); (c) the identity and whereabouts of any suspects, if known; (d) the identity and whereabouts of any witnesses, if known; (e) the location of evidence; and (f) details of any investigation carried out by the complaining State party or, to its knowledge, any other State.

Concerns, however, were expressed about stipulating a mandatory list of requirements for a complaint, because such a list might make it more difficult for States with fewer resources to lodge a bona fide complaint. For that reason, some support was expressed for the words "as far as possible" in paragraph 3 of article 25, for they allowed a degree of flexibility.

As regards the wording of paragraph 3 of article 25, it was, according to one view, sufficient for the statute; more detailed rules specified in the preceding paragraphs could be placed in a second tier instrument. According to another view, the paragraph needed detailed elaboration of the rules of procedure.

As regards the role of the Prosecutor, the following points were made: (a) the Prosecutor should be able to ask for clarifications of a complaint; (b) the prosecutor should not be bound by allegations in the complaint about who is or should be a suspect or accused; (c) the Prosecutor should be able to pursue criminal acts that are closely related to those in the complaint or which form a continuing pattern of criminal activity; but (d) if the complaint is to serve as a trigger, the investigation should not stray into unrelated or clearly collateral matters. Views differed as to whether the prosecutor was bound by the content of complaint, or whether the prosecutor's investigation may extend beyond the content of a complaint. One view supported the former, while another expressed preference for the latter. There were uncertainties as to whether a complaint by a State should be too specific or should only refer, as in the case of a referral by the Security Council, a situation to the Court.

[With respect to who can make a complaint, three different views were expressed. According to one view, only States parties should be empowered to lodge a complaint. According to another view, States parties and the Security

Council should be able to lodge a complaint. According to yet a third view, the prosecutor should be allowed to initiate investigation based on any credible information provided to him or her, a model similar to that provided for in the Statute of the International Criminal Tribunal for the Former Yugoslavia.]

The dual complaint system under article 25, one for genocide and the other for other crimes, was considered by some as undesirable. Preference was expressed for a single, unified system, applicable to all crimes.

It was suggested that the question of triggering mechanism be addressed in two separate articles, one dealing with complaints by States and the other with complaints by the Security Council. This would permit prescribing whatever special requirements would be needed for referral of situations to the Court by the Security Council under Chapter VII of the Charter.

Article 26. Investigation of alleged crimes

As regards the initiation of investigations, there were various suggestions for providing a minimum threshold, a screening mechanism or a judicial filter to distinguish between well-founded complaints of sufficiently serious crimes and frivolous or vexatious complaints. It was suggested that a State party, or a person referred to by name in a complaint, should be allowed to challenge before a trial chamber the submission of a complaint prior to the initiation of an investigation, on various grounds (e.g., the sufficiency of the complaint, the basis for jurisdiction and the admissibility of the case in terms of the principle of complementarity and the gravity of the alleged crime). A State party which was conducting a related investigation should also be allowed to send its objections to the Prosecutor.

There were different views as to whether the Prosecutor should be authorized to initiate investigations ex officio. It was suggested that the Prosecutor should be authorized to do so based on sufficient, verifiable information received from any reliable source to strengthen the independence of the Prosecutor and the effectiveness of the Court.

With respect to the role of the Prosecutor, a spectrum of views were expressed: the Prosecutor should conduct an independent and impartial investigation on behalf of the international community and should collect incriminating and exonerating information to determine the truth of the charges and to protect the interests of justice; he should seek the cooperation of States in conducting investigations rather than carrying out such activities directly for reasons of efficiency and effectiveness, and the investigations would be conducted in accordance with the statute and the rules of the court as well as the national law of the State in whose territory the investigation was conducted; the Prosecutor should be able to seek cooperation directly from States or could be authorized to conduct direct investigations in exceptional situations in which there were concerns regarding the objectivity of the national authorities.

With regard to on-site investigations, different ways to conduct such activities were mentioned: these investigations should only be conducted with

the consent of the State concerned to ensure respect for its sovereignty with the possible exception of situations in which the national criminal justice system was not fully functioning; the Presidency could empower the Prosecutor to conduct such investigations if there were no civil authorities to whom a request for assistance could be transmitted; the Presidency should appoint a judge or a chamber to supervise on-site investigations and thereby protect the rights of the suspect or accused whose counsel could also be present.

There was some question as to whether the Presidency was the appropriate body to issue investigative orders, with questions being raised as to the legal effect of such orders. It was stated that the reference to orders concerning "provisional arrest" in this context could create confusion with the use of this term in relation to extradition. It was suggested that an investigation chamber should monitor the investigative activities of the Prosecutor to give judicial authority to these activities, to decide on requests for State cooperation, to ensure equality between the prosecution as well as the defence and to enable the suspect to use the resources of the Court. This chamber could also decide on objections of States to decisions on investigative measures prior to an indictment. There was, however, the view that such tasks could be entrusted to a single judge or magistrate rather than creating an additional chamber.

Attention was drawn to the need to further consider and clarify the standard to be applied by the Prosecutor in deciding whether to initiate an investigation or to file an indictment. It was suggested that the Prosecutor should, for example, have broad discretion to decide not to initiate or to discontinue an investigation or prosecution in the interests of justice due to the age or illness of an individual or a national investigation or prosecution, or to have the authority to decline to investigate or to prosecute certain cases which were not of sufficient gravity and to select the most important cases when crimes were committed on a massive scale.

The view was expressed that the complainant State or the Security Council, as appropriate, should be informed of the Prosecutor’s decision not to initiate an investigation or to seek an indictment. Any State whose cooperation had been requested during an investigation should also be informed of the latter decision. There were various suggestions to provide for the judicial review of these decisions by the Presidency, a trial chamber, an investigation chamber, or a judge at the request of the complainant State, the Security Council or the victims. There was some question as to whether the complainant State or an appropriate judicial body should be entitled to initiate a review of such a decision and the manner in which the complainant State should submit its views. It was suggested, for example, that the judicial review should be based on a specific legal standard, such as manifestly inappropriate, which would defer to the appropriate exercise of prosecutorial discretion; that the authority of the judicial body should be limited to requesting the Prosecutor to reconsider a decision to preserve prosecutorial discretion and independence; and that the Prosecutor should be able to reconsider such decisions based on new information.

As regards the rights of the suspect, the view was expressed that these rights should be further elaborated in accordance with international standards and contained in a separate article. Emphasis was placed, inter alia, on the

right of the suspect to receive a sufficient warning before being questioned, to remain silent during questioning, to not be compelled to testify or to confess guilt, to receive the assistance of competent counsel irrespective of the ability to pay for such assistance and to equal protection before the law. The view was expressed that the enumeration of the rights of the suspect should, however, be non-exhaustive.

Article 27. Commencement of prosecution

It was suggested that the indictment filed by the Prosecutor in a particular case should contain more detailed information than that stipulated in paragraph 1 of the article. However, if the evidence collected in the case was excessive, then a summary could be provided to the reviewing body, which would have the right to request further information as needed.

As regards the reviewing body, concerns were expressed over the concentration of authority vested with the Presidency as envisaged in the draft statute, and it was suggested that it would be more appropriate to give certain pre-trial responsibilities to another body, independent of the Prosecutor and the trial and appellate chambers. In this connection, it was proposed that a pre-trial or investigations chamber be established to examine the indictment and to hold confirmation hearings, which would provide the accused with further necessary guarantees considering the very public nature of an indictment for serious crimes. The point was made that a permanent reviewing chamber would have the advantages of consistency of approach and avoidance of difficulties associated with a rotation of judges.

It was also suggested that either a single judge or a panel of three judges, serving on a rotational basis, should have the function of ruling on pre-trial matters. The same judge performing pre-trial functions should not, however, be involved with the case at later stages. In addition, the judges of the reviewing body should not be of the same nationality as the accused.

Regarding the standard on which the indictment would be based, the statement was made that whatever standard was ultimately employed should be sufficiently high to justify trial proceedings. It was suggested that the timing of the exercises contained in paragraph 2 (a) and (b), i.e., determination of a prima facie case and the admissibility of a case before the Court, should be clearly delineated.

There was the view that the statute should address the Court’s ability to issue arrest warrants prior to any confirmation of an indictment, as well as the need to maintain the confidentiality of an indictment until the arrest is made, in order to ensure custody of the suspect and to prevent destruction of evidence. It was further proposed, as is also provided for in rule 61 of the Rules of Procedure of the International Criminal Tribunal for the Former Yugoslavia, that provision be made in the statute that would allow for seizure of the accused’s assets under certain circumstances.

With respect to paragraph 3, it was proposed that the reviewing body should indicate the reasons in those cases where it refused to confirm the indictment.

As regards the requirements under paragraph 4, it was pointed out that any amendments to the indictment should not result in the charging of new crimes against the accused. Moreover, the requirement of notifying the accused of any amendments should be done promptly and in the language of the accused, in accordance with the International Covenant on Civil and Political Rights (article 14, para. 3 (a)).

Article 28. Arrest

Article 29. Pre-trial detention or release

Article 30. Notification of the indictment

It was stressed that there were matters within the purview of the State and those within the purview of the Court and only those functions performed by the Court should be regulated by the statute. It was recognized that State cooperation with the Court was essential for the carrying out of effective and efficient arrest and detention procedures. Attention was also drawn to proposals, submitted at the first session of the Preparatory Committee, for the reformulation of articles 28 and 29 which would provide for more clarification and concise wording regarding arrest and detention.

As regards the arrest of the suspect, the view was expressed that the proceedings under article 28 should be conducted under the control of the relevant national authority. Moreover, since many countries would not accept the direct execution of an arrest warrant on their territories, the statute should provide that States should execute the warrant on behalf of the Court.

It was suggested that the term "provisional arrest" used in article 28 be replaced by another term to avoid improper analogizing to the extradition model.

Holding the suspect for a period of 90 days to allow time for confirmation of the indictment was deemed reasonable considering the serious nature of the crimes in question and the complicated investigation that would ensue. On the other hand, the view was also expressed that the 90-day period was too long and should be reduced. It was also suggested that once the Presidency was satisfied that there was no prospect that the required arrest criteria would be met, the suspect should immediately be released. Concern was also expressed over the provision contained in paragraph 2 of article 28 allowing the Presidency to extend the 90-day period to a seemingly indefinite period of time, and in this regard, the suggestion was made to have a fixed period. Provision also could be made for an extension based on compelling reasons.

It was felt that article 29 on pre-trial detention or release needed further clarification in respect, inter alia, of the determination by the judicial officer of the warrant duly served and the purpose of such determination. It was suggested that the determination of the lawfulness of the arrest or detention, as well as bail, should be made by the relevant national authorities. However, the statute should provide guidelines for the grounds for detention and release for those occasions when the Court has custody of the suspect.

It was proposed that, in accordance with the International Covenant on Civil and Political Rights, detention of a suspect before trial should be limited to exceptional cases, such as danger of flight of the suspect, threat to others or the likelihood of destruction of evidence. It was also suggested that provision should be made for other options, such as allowing the custodial State to guarantee the availability of the suspect before the Court without actually detaining the suspect, or house arrest.

It was considered useful to make clear in the provision on notification of the indictment, as contained in article 30, that State authorities should normally make service of documents. It would not be cost-effective or necessary for reasons of fairness for the Registrar of the Court to travel to each country where the suspect was detained to serve the indictment.

PART 5. THE TRIAL

Article 34. Challenges to jurisdiction

Article 35. Issues of admissibility

Article 36. Procedure under articles 34 and 35

As a general comment, it was noted that the provisions dealing with the organization of the trial should be more detailed than those provided for in the draft articles formulated by the International Law Commission. Such provisions should, in addition to providing for a speedy and fair trial, also provide for the following: the protection of witnesses; the right of the victim to reparation; the possibility of trial in places other than the site of the Court; the possibility of trial in absentia, if the accused is a fugitive; confidentiality of information and evidence; and suppression of false evidence.

The discussion on articles 34, 35 and 36 was focused on three main questions and it showed that further elaboration and clarification were requested.

As regards the question of who may challenge the jurisdiction of the Court or object to the admissibility of the case (article 34), it was noted that the term "interested State" was too vague and should be defined as those States entitled to exercise jurisdiction, including the State of nationality of the accused, the State where the crime was committed, the State of nationality of the victims and the custodial State. According to one view, such interested States should also be parties to the statute. According to another view, there was no logical reason to deprive a non-State party that had a direct and material interest in the case from challenging the Court's jurisdiction. Thus according to this view, any State that had a right to consent to the Court's jurisdiction under the statute should be able to challenge that jurisdiction. It was also pointed out that the accused should have the right to challenge the jurisdiction of the Court. The question, however, was raised as to whether the accused should be permitted to challenge jurisdiction on grounds of lack of consent where the State whose consent was required had not?

As regards the question of when such a challenge may be made (article 35), a preference was expressed for as early a time as possible. It was suggested that the right to challenge jurisdiction or admissibility be limited to pre-trial hearings or to the commencement of the trial. To avoid any misuse of the Court or unnecessary expenditure, it was suggested that any challenge to jurisdiction or admissibility should be raised and decided upon before any step in the trial was taken. In addition, challenges to jurisdiction should be permitted only once and not at multiple stages of the process. Preference was expressed for limiting the time within which challenges to jurisdiction or admissibility may be made. In this regard it was noted that States with an interest in a case should be given notice of indictment. This could be facilitated by notification of an indictment from the Court to all States parties.

It was stated that only in exceptional cases should challenges to jurisdiction be permitted during the trial. Such exceptional cases would include the discovery of new facts which could affect the question of jurisdiction. It was also noted that a fugitive who is at large should not be permitted to challenge jurisdiction, thereby taking advantage of the processes of the Court, while maintaining the option of refusing to submit to it if it ruled against him or her. The question was also raised as to whether an accused should be permitted to wait until the later stages of trial to raise a jurisdictional challenge that could have been brought much earlier. A view was also expressed that there should be no distinction between the right of the State and the accused in terms of when either could challenge the jurisdiction of the Court. Hence paragraph (b) of article 34 should be deleted. It was further stated that an accused should not be able to challenge admissibility on the grounds of a parallel investigation by national authorities where those national authorities had, in fact, declined to challenge the Court's jurisdiction. These issues involved how best to allocate prosecutorial power between the Court and States in which the accused did not have a proper role.

As regards the question of according to which procedure challenges could be made (article 37), different views were expressed. One view was that objections to jurisdiction should be raised before a chamber other than the Trial Chamber; such a chamber might be the indictment chamber or the investigative chamber. This procedure, it was suggested, was compatible with maintaining the independence of the Trial Chamber. According to another view, the question of objections to jurisdiction should be dealt with by the Trial Chamber itself. It was noted that there should be a decision as to whether decisions on challenges to jurisdiction or admissibility could be appealable. If so, the statute should clearly provide the procedure for such appeals. It was also noted that article 36, paragraph 2, on the referral of a matter to the Appeals Chamber, required further guidance with respect to the prerequisites for such a referral.

It was stated that when an individual has been investigated and/or prosecuted by national authorities, the decision to override that national process should be by a two-thirds majority of the Court, in deference to national process.

Article 37. Trial in the presence of the accused

Different views were expressed on this question. One view was that trial in the presence of the accused constituted a fundamental right of the accused and that this right must be observed. Consequently there could be no trial *in absentia*.

Another view was that the present context was different; it involved exceptional circumstances (e.g. crimes affecting the international community) and pertained to a special international judiciary organ which would not have an enforcement mechanism to ensure the presence of the accused. There was therefore room to consider trial *in absentia* at least in certain specific cases. It was, however, stressed that the rights of the accused must be fully guaranteed and the circumstances and conditions clearly stipulated.

Specific comments were made on the text of article 37.

Concerns were expressed over article 37, paragraph 2, which provided for exceptions to the general rule. It was pointed out that even the limited exceptions provided for in that paragraph were not in conformity with the rights of the accused as contained in various international human rights instruments and national constitutions, and should therefore be deleted. It was further commented that the reference to "ill-health" in paragraph 2 (a) constituted only a reason for the adjournment or the suspension of trial and not for a trial in absentia; continuing disruption of the trial by the behaviour of the accused was not a legitimate excuse and it should be remedied by such practical measures as using video conference or creating a security area for the accused, treating such behaviour as contempt of court. As far as trial in absentia for reasons of security was concerned, it was noted that practical alternatives should be sought (e.g. temporary relocation of the court or the use of video conference).

It was also observed that in the case of escape from bail or from lawful custody, the focus for the international community should be on cooperation in locating and re-apprehending the accused. The accused should be warned in advance that in case of escape, he or she could be tried in absentia. It was suggested that the term "lawful custody" needed further clarification. It was pointed out that the distinction between "deliberate absence" referred to in article 37, paragraph 4, and escape "from lawful custody" referred to in paragraph 2 (c) of that article was not clear and should be clarified.

It was stressed that in cases of trial in absentia, the rights of the accused should be set out in detail to include, for example: the possibility for the Court to review the order to exclude the accused, the right of the accused to be informed (through the Registrar) of the proceedings, to be questioned in the presence of his or her counsel and of the Prosecutor or to be always legally represented by a counsel of his or her choice (or appointed ex officio).

Specific comments were also made to paragraph 4, which permitted the establishment of an Indictment Chamber for certain specific purposes in cases of deliberate absence of the accused. Concerns were expressed that the effectiveness of the Court might be undermined in those cases. There was, however, support for such an indictment chamber for the purpose of recording the evidence or issuing and publishing an international warrant or arrest for the accused. This should not, in some members' view, lead to either partial or full trial in absentia. There was the view that trial in absentia may take place when the accused was deliberately absent, or when the accused implicitly or explicitly waived his or her rights, provided that rigorous safeguards should be taken to preserve the rights of the accused. It was also suggested that neither a verdict should be reached nor imprisonment should be imposed in a trial in absentia. In any case, the trial should be reopened at the request of the accused if it had already taken place in absentia. The accused should be able to challenge the admissibility of the evidence recorded in his or her absence. Also, the right of appeal against any decision granted in absentia should be allowed so as to strike a balance between the necessities of justice and the rights of the accused.

Article 38. Functions and powers of the Trial Chamber

There were a number of general remarks: consideration should be given to when the Trial Chamber was constituted and whether pre-trial motions should be dealt with by another entity; the accused should be informed of the composition of the Chamber to facilitate challenges under article 11; some matters addressed in paragraph 1 should be dealt with during the first appearance of the accused before a chamber rather than at the commencement of the trial; and pre-trial motions should be addressed, possibly along the lines of rule 73 of the International Criminal Tribunal for the Former Yugoslavia.

As regards paragraph 1 (d), there were different views as to whether the accused should be allowed to enter a plea of guilty or not guilty and the consequences of a guilty plea. The view was expressed that the accused should be allowed to enter a plea of guilty which would have the procedural effect of obviating the need for a lengthy and costly trial: the accused would be allowed to admit his wrongdoing and accept his sentence; the victims and witnesses would be spared any additional suffering; and the Court would be allowed to take the guilty plea into account in sentencing the convicted person. The accused should also be allowed to enter a plea of not guilty, to benefit from the presumption of innocence and to offer a defence without affecting the duty of the prosecution to prove the charges. A court was not bound to accept a plea or a recommendation for leniency.

In contrast, the view was also expressed that the accused should be able to acknowledge the deeds attributed to him and the Court should be able to consider the admission as evidence; the admission should not be the only evidence considered by the Court; the admission should not have any consequences for the trial procedures; the Chamber had a duty to determine the guilt or innocence of the accused notwithstanding an admission; and a full trial was necessary given the seriousness of the crimes and the interests of the victims as well as the international community. It was suggested that the Court should not have the power to convict the accused based solely on his confession or a single testimony, the Court should be subject to a minimum evidentiary rule concerning admissions or confessions made in Court, and the Court should be subject to a rule of legal reasoning for its decisions concerning guilt and the elements of the indictment, and therefore paragraph 1 (d) should be deleted. It was noted that this paragraph was contrary to the constitutions of some States and could prevent their acceptance of the statute.

Attention was drawn to the need to bridge the gap between different legal systems, some of which did not provide for a plea by the accused with respect to the charges, with emphasis being placed on finding the common denominators in different legal systems. It was suggested that if the accused admitted the facts contained in the indictment, then the Trial Chamber could decide to conduct an abbreviated proceeding to hear a summary of the evidence presented by the prosecution or to continue with the trial if the accused failed to reaffirm the admission or to accept the proceeding. It was further suggested that the Trial Chamber should determine whether the accused fully understood the nature and consequences of admission of guilt, whether the admission was made voluntarily without coercion or undue influence, and whether the admission was supported by the facts contained in the indictment and a summary of the evidence

presented by the prosecution before deciding to request additional evidence, to conduct an expedited proceeding or to proceed with the trial. It was stated that the Court must have the power to satisfy itself before taking a decision.

Paragraph 1 (d) was described as relating to the question of plea bargaining, which should be excluded given the serious nature of the crimes which affected the interests of the international community as a whole. However, it was also stated that guilty pleas were not inseparable from plea bargaining.

Regarding paragraph 2, the view was expressed that the Chamber should play an active role in guiding the trial proceedings and be entrusted with establishing evidence for or against the accused. It was also stated that procedural matters relating to the order of presentation of evidence should be dealt with in the Rules, while protective measures for victims and witnesses should be elaborated in the statute.

As regards paragraph 3, it was suggested that joinder of accused and joinder of crimes should be addressed in the Rules.

With regard to paragraph 4, the view was expressed that the principle of public trials should be clearly stated as the strong preference in the statute and that any exceptions should be very limited. Suggested exceptions to this principle related to public order; the dignity of the proceedings; the security or safety of the accused, victims or witnesses; crimes allegedly committed by minors; and victim or witness testimony concerning sexual violence. Various concerns were expressed regarding the reference to "confidential or sensitive information". The power of the Chamber to maintain order might obviate the need for conducting trials in the absence of a disruptive accused under article 37. The Chamber should also have the power to impose sanctions for failure to respect its orders to provide deterrence, as in rule 77 of the International Criminal Tribunal for the Former Yugoslavia. Decisions concerning in camera proceedings and the verdict should be announced in a public session.

There were a number of remarks concerning paragraph 5: paragraph 5 (b) and (c) should be amended to refer to witnesses who appear before the Court; a new paragraph 5 (c) bis should be added to enable the Chamber to request the assistance of States in taking witness testimony and producing documents or other evidence outside of court; a chamber should rule on the admissibility of evidence under paragraph 5 (d) at an early stage; the Chamber should rule on evidentiary questions only after hearing the parties; and such matters could be addressed in article 44.

Regarding paragraph 6, it was suggested that the Registrar should be required to prepare a complete written record of the proceedings and possibly a video or audiovisual recording as well.

Article 41. Rights of the accused

It was recognized that respect for the rights of the accused were fundamental and reflected the credibility of the Court and that there was

already a large body of international law on the subject, as contained in such instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, standard minimum rules for the treatment of prisoners and the statutes of the Yugoslavia and Rwanda tribunals, which should be elaborated in the statute. An issue which needed to be explored was the interaction of the Court and the national jurisdiction prior to the transfer of an accused to the Court.

It was stated that the important right of the accused to be promptly informed of the charge needed further elaboration in the statute, as well as a broader guarantee than was currently in the draft statute of speedy conduct of all proceedings. The point was also made that an expeditious trial process would prevent a guilty person from delaying the proceedings, as well as secure the early release of an innocent person. What was needed in this regard was a pro-active court which would properly manage the case to achieve an early resolution of the case.

It was suggested that the statute should provide for the appointment of counsel if the accused could not afford one. In this connection, a list of defence counsel should be developed to allow the accused a choice of counsel. It was pointed out that the qualification for defence counsel should be based on his or her capacity to practise before the highest criminal court in their respective countries, and, in the case of court-appointed counsel, a panel could be established to review counsel according to such criteria as high moral character, competency and relevant experience. It was recommended that there be a presumption in the statute in favour of the accused being represented by counsel. However, in the event the accused chose to conduct his or her own defence, given the grave crimes the accused would be charged with, consideration could be given to the Court’s providing counsel to give legal advice to the accused if so requested. Moreover, provision specifically should be made for the right of confidential communication between the accused and defence counsel.

Given the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage of the Prosecutor over the defence.

It was stated that also fundamental to a fair trial was a provision for the full disclosure of evidence by the Prosecutor to the defence, as well as a reciprocal duty of disclosure on the part of the defence, including notice to the Prosecutor of any alibi evidence the defence might bring before the Court during trial. It was also stated that the provision, contained in paragraph 2 of the article, requesting the Prosecutor to make available to the defence exculpatory evidence should also include the requirement to make available inculpatory evidence prior to the conclusion of the trial, while others stated that these provisions need further elaboration. It was further stated that the problem of the need to protect sensitive information supplied by a State would have to be balanced with the general duty to disclose.

It was also pointed out that the right to confront and cross-examine all witnesses was a fundamental right, and in this regard concern was expressed over the possible use of anonymous witnesses, since the defence’s ability to probe the credibility of the witness to show a motive to lie or to show a mistake was

made depended to a large extent on who the witness was. The view was also expressed that there was a need to take into account special measures for a child witness.

The right of the accused not to be compelled to give testimony was supported, as was the right of witnesses to enjoy some degree of protection from giving self-incriminating testimony.

Concerning the need for translation of documents, a suggestion was made that the statute should not allow for the translation of all relevant documents if the accused's counsel had command of either of the working languages of the Court. The question of the costs involved in translation of documents was also raised.

Recommendation was made to make provision in the statute for the accused's right to compensation in the event of his conviction being reversed or his being pardoned on the ground of newly discovered evidence.

With respect to specific drafting points, it was suggested, for example, that the words "subject to article 43" contained in paragraph 1 of the article be replaced with "having due regard to article 43" so as not to place the rights contained in article 43 in a superior position over the rights of the accused. It was further suggested that the words "subject to article 37 (2)" contained in paragraph 1 (d) be deleted.

Article 43. Protection of the accused, victims and witnesses

It was pointed out that this article was of a very general nature and should be further elaborated and more precisely formulated. Attention was drawn in this regard to the principles of justice for victims of crimes contained in the 1985 United Nations Declaration on the topic, as well as principles, recently elaborated by an expert group, guaranteeing the rights and interests of victims in the proceedings of the Court. The view was also expressed that the protection of the accused, victims and witnesses should be the obligation of the State concerned. Given the importance of protecting victims and witnesses, it was further recommended that their protection should be addressed in a separate provision from that of protection of the accused. At the same time, the point was made that the statute must contain a balance of rights between the two groups and that any protections bestowed on victims and witnesses should not undermine the rights of the accused to receive a fair trial.

It was stated that measures of protection employed should be non-exhaustive. Reference was made to the witness protection programmes found in many national jurisdictions. It was suggested that provision be made to protect the identity of victims and witnesses in particular cases which, at the same time, would not unduly prejudice the defence. It was further suggested that the Court should obtain the cooperation of the victim or witness before offering any type of protection. The view was also expressed that victims and witnesses should be encouraged to come forward, and in this connection a court should be created that treated these individuals with concern and respect.

Particular concern should be given to children and the mentally impaired and victims of sexual assault. There were also proposals relating to the need to keep victims and witnesses informed of the progress of the case. Attention was drawn to proposals, as well as the precedent of the Yugoslavia Tribunal, for a witness and victim unit to be established to provide services and support to victims and witnesses, under the supervision of the offices of either the Registrar or the Prosecutor.

It was recommended that provision be made in the statute for payment of compensation to victims who have suffered damages. There were several proposals concerning this issue and included the possibility of the Court being empowered to make decisions on these matters, including the administration of a compensation fund, as well as to decide on other types of reparation. It was further proposed that both the victim and the accused should be allowed to take part in such a proceeding. Concern, however, was expressed over the Court's ability to adequately follow through and ensure that restitution was made. The view was also put forward that since the question of compensation was essentially a civil matter, the Court could decide the scope of the victimization and, relying on this judgment, the victim could pursue the matter of remedies through the appropriate national jurisdiction.

With respect to specific drafting points, it was suggested that the words "subject to article 41" be added to article 43.

Article 44. Evidence

The question of whether the rules of evidence should appear in the statute or in the Rules of Procedure of the Court or in some other form was among those raised by this article.

It was noted that the rules of evidence constituted an integral part of the due process of law and of the rights of the accused.

A commonly shared view seemed to be that fundamental or substantive principles of evidence should figure in the statute itself while secondary and subsidiary rules could appear in the Rules of the Court or other instruments. This approach would be more flexible since the latter could be more easily amended than the statute and would also allow the Court the flexibility to adopt rules according to its practice and requirements. Certain examples of such principles were given: the judicial notice, the presumption of innocence of the accused, the capacity of witnesses to testify, the right to refuse to answer incriminating questions or the evaluation of documentary evidence. Written proposals were submitted for that purpose. It was, however, recognized that the task would be difficult since this would first involve a selection of the fundamental principles from the main legal systems of the world, and would then entail the distinction between the principles, rules and subsidiary rules.

The issue of perjury was also in the centre of the debate on this article. One view was that States parties should extend their national laws of perjury to cover evidence given by their nationals before the Court. The Court should only

be concerned with whether perjury had taken place; the consequences of perjury should be left to the States concerned.

Another view was that the Court should be able to control its proceedings, address the reliability of evidence presented, and impose penalties in case of perjury; to leave such issues to States would entail many legal and practical difficulties, lengthy proceedings and jurisdictional conflicts. Rules concerning perjury should therefore be included in the statute.

Another issue related to the means of obtaining evidence and the exclusion of evidence (paragraph 5 of article 44). This raised, inter alia, the important question of judicial cooperation between the Court and national jurisdictions since very often evidence presented to the Court was obtained in the States concerned, in accordance with their national rules. The possibility for the Court to inquire whether such evidence had been obtained in accordance with national rules or not was discussed. It was suggested that there should be created a mechanism by which the Court, in cases of allegations of evidence obtained by national authorities by illegal means, could decide on the credibility of the allegations and the seriousness of "violations". The view was expressed that the Court should not get involved in intricate inquiries about domestic laws and procedures and that it should rely on judicial cooperation. It should only exclude, for example, evidence obtained in violation of fundamental human rights, or minimum internationally acceptable standards (such as the Guidelines of the United Nations Congress on Prevention of Crime and Treatment of Offenders), or by methods casting substantive doubts on its reliability.

Article 45. Quorum and judgment

With respect to the question of quorum and presence in the Trial Chamber, a general view seemed to be that the number of the members should preferably be odd (e.g., five) and that all members as well as the Prosecutor should be present at all stages of the trial in the interests of due process and fair trial (the same judges should be present in all hearings when relevant evidence was given, for example). A temporary absence of a judge should result either in the continuation of the trial with the remaining judges or the suspension of the trial. In case of prolonged absence of a judge, replacement should take place.

As for the method of decision-taking in the Trial Chamber, it was generally accepted that it should be by a majority of judges, although some support for unanimity rule (at least in case of a conviction) was also expressed. The judgment should be in writing and as complete as possible, including the questions of the competence and admissibility, as well as reasons for the judgment.

A view was expressed that there was no need to hold two separate hearings - one for the conviction or acquittal of the accused, and one for the sentence, since no jury trial was envisaged and both issues would be decided by judges. It was also suggested that in case of conviction, compensation for the victims or restitution of goods should be considered when appropriate. The view was

also expressed that the accused, when sentenced, should be notified of his right of appeal and the time-limit within which that right must be exercised.

In cases where the Trial Chamber could not agree on a decision, the general view was that the accused should be acquitted; this was not a case for a new trial. Paragraph 3 of article 45 should therefore be deleted.

Another issue was how to deal with dissenting or separate opinions. A view was expressed that such opinions should be made known together with the majority decision, as this would be consistent with the established practice in national and international courts; they might also become particularly relevant in cases of appeals or retrials. Another view was that the criminal proceedings were completely different from proceedings involving civil cases and dissenting or separate opinions would undermine the credibility and authority of the Court.

PART 6. APPEAL AND REVIEW

Three substantive issues were raised regarding appeal: (a) the grounds of appeal, (b) the persons who have the right to appeal, and (c) the proceedings on appeal.

Some support was expressed for the grounds enumerated in paragraph 1 of article 48: procedural error, error of fact or of law, or disproportion between the crime and the sentence. Whether an appeal on the grounds of jurisdiction and admissibility would be possible and at which point it should be made were issues also raised and it was suggested that they should be considered further. A suggestion was that appeals of the Prosecutor should only be allowed on the ground of error of law. Another view was that the grounds of appeal for the Prosecutor and the accused should be the same. It was also suggested that the ground of disproportion between the crime and the sentence as well as the notion of procedural error needed to be further clarified and elaborated.

As concerns the persons who have the right to appeal, it was generally agreed that both the accused and the Prosecutor should have this right. The convicted should be able to appeal on any substantive grounds. If the appeal by the convicted was general (i.e., not only against the sentence), the Appeals Chamber should re-examine the case in its entirety.

As for the question of the proceedings, it was pointed out that a provision on the time period in which an appeal ought to be made should appear in the statute (for example 30 days or longer should the Presidency allow it). The necessity to include more detailed and specific provisions concerning the manner in which the Appeals Chamber would apply rules of procedure and evidence was stressed.

It was also suggested that the judges of the Appeals Chamber should have the right to make public their dissenting opinions and that the number of judges should be odd (for example, seven).

In case of new evidence, a suggestion was that the Appeals Chamber should be able to transmit the case for review to the Trial Chamber with different composition. It was stressed that a complete separation of membership between the Trial and Appeals Chambers was necessary.

Terms such as "unfair [proceedings]" or "error of fact or law" in article 49 were considered not clear and needed to be further clarified. It was also considered necessary to define clearly the criteria according to which a new trial should be ordered as distinguished from those for a reversal or an amendment of a decision.

With regard to the effect of an appeal, it was suggested that unless the Trial Chamber decided otherwise, a convicted person should remain in custody pending an appeal, though the appeal should have an effect of suspending the execution.

As concerns the question of the revision of a conviction, it was felt that the grounds should go beyond those indicated in article 50 and should possibly

include cases where evidence proved to be false or invalid, a grave violation of duties of judges had occurred, or when new facts come to light which were unknown at the time of the trial. But the grounds for revision should be more limited than those for appeal. It seemed to be a general view that revision should not be subject to a time-limit and could take place any time (even after the death of the convicted, if requested by his relatives or anybody else concerned).

It was considered necessary to elaborate the rules for the determination of when to constitute a new Trial Chamber or reconvene the Trial Chamber or refer the matter to the Appeals Chamber.

In case of a revision of a conviction or of acquittal of a convicted, it was suggested that provision for compensation should be included in the statute.
